Freetown
Sept. 18,
1961

Marke J.

[SUPREME COURT]

JOHN COBY SAMUELS . . . . . *Plaintiff*

v.

UNITED AFRICA COMPANY . . . . . *Defendant*

[C. C. 143/57]

Tort—Malicious prosecution—Whether defendant was prosecutor—Reasonable and probable cause for prosecution—Malice—Damages.

Plaintiff was under contract with defendant to carry kerosene from Freetown to Segbwema. After plaintiff received the kerosene, it was alleged that he had not delivered it but had stolen it. Plaintiff was prosecuted for larceny, but was discharged. He then brought an action against defendant for malicious prosecution and false imprisonment. At the trial, plaintiff testified that after he had been arrested defendant's accountant had said that if plaintiff agreed to pay for the kerosene he (the accountant) would withdraw the case.

Held, for the plaintiff, (1) plaintiff was prosecuted on criminal charges by the defendant company acting through their accountant.

(2) Defendant did not have reasonable and probable cause for prosecuting plaintiff.

(3) "The defendant company, in instituting the proceedings, acted from improper motives and without honest belief in the substantiality of their own allegation."

(4) Plaintiff was entitled to £665 special damages and £1,000 general damages.

Note: This decision was reversed by the Sierra Leone Court of Appeal on March 5, 1962 (Civil Appeals 8 and 11/61).

Case referred to: *Hicks* v. *Faulkner* (1878) 8 Q.B.D. 167.

Cyrus Rogers-Wright for the plaintiff.
E. Livesey Luke for the defendant.

MARKE J. The plaintiff, a motor transport contractor and a dealer in motor spare parts, was on November 18, 1956, arrested and charged with the following offences:

"(1) That he on or about the 25th day of February 1956 at Freetown, in the Police District of Freetown in the Colony of Sierra Leone did steal as a bailee 20 drums of 44 gallons kerosene value £203 16s. 8d. the property of the United Africa Company (sic) cont. to section 2 of the Larceny Act, 1916.

"(2) That he on or about Wednesday the 25th day of April 1956 at Freetown, in the Police District of Freetown in the Colony of Sierra Leone did steal as a bailee 20 drums of 44 gallons kerosene value £208 16s. 0d. the property of United Africa Company (sic) cont. to section 2 of the Larceny Act, 1916."

At the preliminary investigation into the first charge, the learned trial magistrate, after hearing all the witnesses for the prosecution, held that the prosecution had failed to prove a prima facie case against the accused and discharged him.

On the second charge the plaintiff was committed to stand trial on information before the Supreme Court. At the trial in the Supreme Court, the Detective Sub-Inspector who investigated the charges was called to give evidence as the third witness for the prosecution. After that witness had given evidence, the Crown offered no further evidence and the learned trial judge directed the jury to return a formal verdict of Not Guilty, which they did.

Having been acquitted on these two charges of larceny, the plaintiff has brought this action. The defendants in their statement of defence deny that either of the said prosecutions was initiated and carried on by either they themselves or their accredited servant or agent. They averred in their pleadings that the charges were made, the plaintiff arrested, and the prosecutions carried on by the police; and alternatively the defendants denied that they acted without reasonable and probable cause and with malice.

From the evidence of the defendants' own witnesses the plaintiff was well known in the defendant company and had according to one of the defendants' witnesses been in business with the defendant company for about 12 years. Another witness, the Factor at Segbwema, Mr. Chebli, said, "I do not doubt plaintiff's integrity," and from the evidence it is clear that the plaintiff's address was known. In spite of this the plaintiff was arrested on warrant when a criminal summons would have been sufficient to bring the plaintiff before the court. The defendant company could not however be blamed for this exercise of a judicial discretion.

It may be convenient at this stage to consider the system of business between the parties.

When the defendant company required the services of the plaintiff, they would inform the plaintiff of the number of lorries that would be necessary to convey the goods they required to be transported to the Provinces.

The plaintiff then would go to the defendant company distribution centre where he would be handed an order on some depot of the defendant company. In the case of kerosene and petrol this order is on the installation at Kissy.

The plaintiff hands this order to a driver to collect the goods. The driver presents the order (in the case of kerosene and petrol, at the installation at Kissy) and, on the authority of the order, is given the number of drums of kerosene specified therein together with two copies of a way-bill in which is stated the goods taken away, the lorry number and the destination of the lorry (that is the place where the goods were to be delivered). The driver signs the original copy of the way bill which is left with the installation at Kissy as a receipt for the goods delivered to him.

When the goods are finally delivered at their destination the factor at the receiving end signs the second of the two way-bills which were given to the driver at Kissy installation and then returns the second copy to the driver; the first copy the factor retains for his records.

It is this signed copy of the way-bill which is presented to U.A.C. Freetown, where a pay slip is made out for the amount to be paid by U.A.C. Limited to the lorry owner for transporting the goods to their destination. Messrs. U.A.C. Ltd. keep this second bill which is pasted on the left-hand side of the pay slip book.

The pay slip is then presented to the cashier of Messrs. U.A.C. Ltd. for payment but not necessarily on the same day or even in the same month it was made out.

The plaintiff in his evidence said that it was not his practice to present a single pay slip for payment; but he would allow pay slips to accumulate in his office before presenting a number of them for payment.

From the evidence of the plaintiff, Mr. Brown the accountant of Messrs. U.A.C. Ltd., spoke to him in his office in July or August 1956 to the effect that the factor of Messrs. U.A.C. Ltd. at Segbwema had not received consignments of 20 drums petrol and 20 drums kerosene. The plaintiff said that he told the accountant to make a check of Messrs. U.A.C. Ltd. as he the plaintiff had been paid for transporting kerosene and petrol to Segbwema. I quote from the plaintiff's evidence what follows:

> "The accountant said that what I had suggested about U.A.C. making a check did not interest him. What he was concerned with was the report from Segbwema that Segbwema had not received the consignments of petrol and kerosene."

Continuing the plaintiff said:

> "The accountant said that I should pay for the 20 drums petrol and 20 drums kerosene. I refused to pay as I had evidence that the petrol and kerosene had been delivered at Segbwema."

The plaintiff then asked the accountant to interrogate any of the drivers who transported the drums and petrol. It has to be noted in passing that the plaintiff himself did not drive any of his lorries and did not accompany his lorries when transporting goods to Segbwema or to any other place: and this fact was known by Messrs. U.A.C. Ltd.

However about three weeks after this interview the plaintiff was arrested on a charge of stealing kerosene and petrol the property of Messrs. U.A.C. Ltd.

After his arrest, the plaintiff called on the accountant on the matter which had led to his arrest. The plaintiff said:

> "I told him that I felt he wanted to disgrace me. He said he did not care. He said that if I had stolen the kerosene and petrol he could debit my account with the cost of the kerosene and petrol. I said I had not stolen the kerosene and petrol. He said that if I agreed to pay he would withdraw the case. I said I would not pay."

It is significant that in all the excerpts I have quoted above from the plaintiff's evidence he was not cross-examined on any of the points raised therein, nor was contradictory evidence called in respect of any of them, and above all, that Mr. Brown, the accountant, was not called as a witness, although one of the defence witnesses said in his evidence that Mr. Brown was, during the hearing of this action, in Sierra Leone, at Bo, a place about 160 miles from Freetown, and easily accessible by air, road and train from Freetown. Yet for some reason best known to the defence, Mr. Brown was not called as a witness.

It is clear beyond doubt that the plaintiff was prosecuted on two criminal charges. Counsel for defendant company had argued that the defendant company could not be liable for false imprisonment because the police when they arrested relied on their own judgment.

It has to be remembered that Mr. Brown was the accountant of the defendant company and as such accountant must have known or be taken to have known of the existence of all books of account kept by the company in

respect of the payment by the company for the conveyance of its goods by outside motor contractors. If we are to assume that Mr. Brown after looking through the pay slip book found no evidence that the plaintiff had been paid, there was yet the cashier's cash book which as a reasonable, prudent and cautious person he could have examined to satisfy himself whether or not his company had paid the plaintiff for the transport of the goods in question.

Then we have the evidence of the detective whom Mr. Brown interviewed, in the answer to me. No questions were asked by the defendant company's counsel on the detective's answer which I now quote:

> "If Brown was inquiring into the April consignment to find out if plaintiff had been paid he should have seen the torn off note numbered A598253. If the note was not torn off that might have given him the answer to his inquiry. If the note was torn off I feel it was Brown's duty to have called my attention to it. The fact that the debit note was torn off should have been material in my investigation. But Brown never called my attention to it."

The defendant company's counsel did not ask the detective any questions on this piece of evidence.

Again there is the uncontradicted evidence of the plaintiff in which he said:

> "After I had been arrested, I called on the accountant on the matter which led to my arrest. I told him that I felt he wanted to disgrace me. He said he did not care. He said that if I had stolen the kerosene and petrol he could debit my account with the cost of the kerosene and petrol. I said I had not stolen the kerosene and petrol. He said that if I agreed to pay he would withdraw the case. I said I would not pay."

I underline the words—"If I agreed to pay he would withdraw the case." This bit of evidence not having been contradicted in any way, either by suggestion in cross-examination or by Mr. Brown himself coming into the box and denying it, I am bound to accept it as true. From this bit of uncontradicted evidence it seems that Mr. Brown rightly or wrongly felt that he had such a control of the proceedings that he could have stopped the police from going further with the case, which would have left the plaintiff quite free and no longer a man on bail. Whether at that stage Mr. Brown had authority of his employer to institute the criminal proceeding, he nevertheless by the words underlined and in other ways held himself out as prosecutor or allowed himself to be considered as such. On these facts I hold that the plaintiff was prosecuted on two criminal charges by the defendant company acting through their accountant Mr. Brown.

As to the next ingredient in a case of malicious prosecution, there can be no doubt that the two prosecutions ended in favour of the plaintiff.

The next point that comes for consideration in whether there was reasonable and probable cause for prosecuting the plaintiff.

In *Hicks* v. *Faulkner* (1878) 8 Q.B.D. 167, 171, Hawkins J. defined reasonable and probable cause as follows:

> "An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

In this case Mr. Brown did not make reasonable use of the sources of information available to him before instituting proceedings. As an accountant of the defendant company he must be presumed to know of the existence of the cashier's cash book yet there is no evidence that he examined that book or ever referred to it in interview with the police. According to the detective, he showed him the pay slip book (which the detective called the receipt book) went through certain pages of that book with the detective, but did not show him the page on which was the torn debit note. I may state in passing that probably through much handling at the hearing of this case the torn debit note appears now to have been more torn as to make anything written on it almost undecipherable. At the trial the letters SEGBW were clearly decipherable. Continuing, the accountant did not think it necessary to leave the pay slip book with the detective.

Again the defendant company knew that the plaintiff did not drive the lorries which transported their goods; but this fact was not communicated to the police.

The plaintiff in his evidence, said that it was not his practice to present single pay slips, but that he would accumulate them in his office and then present a bundle of pay slips for payment. If the accountant as a prudent and cautious man had examined the cashier's cash book which was available to him, he should have obtained the information he wanted; that is, whether or not the plaintiff had been paid for the consignment to Segbwema.

Then there is the uncontradicted evidence of the plaintiff when he called on Mr. Brown after his arrest, particularly the words, " he said that if I agreed to pay he would withdraw the case."

Further, when the plaintiff asked Mr. Brown to check his records, his answer on the uncontradicted evidence of the plaintiff was that he was not interested in U.A.C. making a check. What he was concerned with was the report from Segbwema that Segbwema had not received consignments of petrol and kerosene. A prudent and cautious man and more so the accountant should have made a thorough check before calling in the police.

In view of this evidence, could it be said that Mr. Brown himself believed in the guilt of the accused, or was he using the strong arm of the law to frighten the plaintiff into paying for a liability which the plaintiff had from the start repudiated?

Added to this, is yet another uncontradicted piece of evidence by the plaintiff, who stated "I am still doing business with U.A.C." Could it for one moment be suggested that if the defendant company itself believed in the plaintiff's guilt they would continue to employ him after he had been arrested, prosecuted and acquitted in doing the same kind of work in respect of which he had been arrested?

It has to be borne in mind that the business he did with the defendant company was the transporting of the defendant company's goods to the Provinces.

There is no evidence what work Mr. Brown is now doing for the defendant company at Bo; but the fact remains that he is no longer the defendant company's accountant at their Head Office in Freetown, where the plaintiff is still employed by the defendant company, from whose headquarters in Freetown he receives payment for his service to them.

Viewing all the circumstances of the case, I hold that there was a lack of reasonable and probable cause in instituting criminal proceedings against the plaintiff.

On the question of malice, we find Mr. Brown an accountant using such words as these: "If you have stolen the kerosene I can debit your account with the cost. . . . If you agree to pay I will withdraw the case."

Such words do not in my opinion represent the words of a person who is anxious to bring a person whom he believes to be guilty to justice: but the words of a person who is using the machinery of our criminal law to achieve not justice but his own private ends. In short, I hold that the defendant company, in instituting the proceedings, acted from improper motives and without honest belief in the substantiality of their own allegations.

On the question of damage, the plaintiff said in evidence:

> "I did the bulk of U.A.C. transport between Freetown and the Provinces. I used to be paid by U.A.C. for transporting their goods between Freetown and Provinces between £800 and £2,000 a month. The transport for U.A.C. I do with my own lorries driven by my drivers. I do not drive the lorries."

This evidence was not contradicted or even challenged by the defence. Continuing, the plaintiff said:

> "I have no assistant in my business. At that time I kept ten lorries—ten drivers and two apprentices to each lorry."

On the question of special damages, defendant company's counsel argues that plaintiff be allowed only solicitor's fees and not counsel's fees. Though such an argument might be perfectly legitimate where the professions are separate and distinct and where all the fees are paid to the solicitor who in turn pays counsel, it cannot apply to this country where lawyers practise as solicitor and counsel. It seems here that what was paid for conducting the case in the magistrate's court is charged for as solicitor's fees and what was paid for conducting the case in the Supreme Court where he was robed as a barrister, as counsel's fees. This should not be taken to mean that I approve of this distinction but I feel without making a rule of it, it would be better if all fees were charged as solicitor's fees.

Exh. "E" is a receipt for £60; Exh. "F" is a receipt for £50; Exh. "F2" is a receipt for £55. I allow these sums as having been paid plaintiff's solicitor for the conduct of criminal proceedings against him. These sums total £165.

As regards the claim for loss of business, counsel for defendant company argued that though the case took six months to arrive at a final decision, the plaintiff did not have to attend court every day in six months, and even then the plaintiff's income of £250 a month ought to be viewed with great caution.

The plaintiff in his evidence said:

> "I sell motor spare parts, kerosene and petrol. When I had to attend court I closed my shop. My monthly profits there was between £200 and £250 a month. I was not able to make that profit between October 1956 and April 1957. During that period my profit was £50 to £60 a month."

In cross-examination the plaintiff said:

> "In the case on Exh. 'A' on most occasions when I attended court the case was adjourned. I used to come to court thrice a week. After court I went back to my business at times. Since I was arrested my mind was not good to do any business."

The plaintiff was never cross-examined as to the figures he gave, thereby leaving the court under the impression that the defence admitted them. He was never contradicted nor even challenged as to the figures he gave. It was only in counsel's final address that he suggested that the figure of £250 income a month should be viewed with great caution.

I accept the plaintiff's evidence that while the cases were hanging over his head "his mind was not good to do any business." But the onus was on the plaintiff to adduce evidence and produced such books as might help the court arrive at a figure representing his loss of business for the period. But from the unchallenged evidence of the plaintiff on this point it is clear that he must have suffered some considerable loss. And upon a consideration of all the circumstances of the case, I award him £500 (Five hundred pounds) for loss of business from October 1956 to April 1957.

As regards general damages, the plaintiff was admittedly in a large way of business. He was a man of integrity and one of the defence witnesses averred that he would not doubt the plaintiff's integrity. It is clear that if Mr. Brown had used all the information available to him, the plaintiff would not have been arrested.

What to my mind aggravates the position is the uncontradicted evidence by the plaintiff as to what Mr. Brown said when he saw him after his arrest. From this evidence it is difficult to come to the conclusion that the defendant company was actuated by honest motives when they instituted criminal proceedings against the plaintiff. Though it is true that the defendant company continued to employ the plaintiff after his acquittal that could hardly be taken as adequate compensation for the humiliation and loss of reputation the plaintiff must have suffered in having to defend the criminal proceedings.

In view of all these considerations I award the plaintiff one thousand pounds (£1,000) general damages.

The order of the court is:

(1) The plaintiff succeeds in his claim.

(2) The defendants to pay plaintiff £665 (six hundred and sixty-five pounds) by way of special damages.

(3) The defendants to pay plaintiff £1,000 by way of general damages.

(4) The several sums of £665 and £1,000, making in all £1,665 to be paid in court and to be paid out to the plaintiff against his receipt.

(5) The defendants to pay the costs of the action.

(6) Costs to be taxed.

Freetown
Oct. 9,
1961

Bankole Jones
J.

[SUPREME COURT]

HON. PARAMOUNT CHIEF T. S. M'BRIWA . . . . *Plaintiff*

v.

TUBERVILLE AND OTHERS . . . . . *Defendants*

[C. C. 67/61]

Tort—Action for assault, false imprisonment, malicious prosecution and conspiracy—Action against members of Native Court—Whether defendants were persons "engaged in the public service"—Whether court exceeded jurisdiction in passing sentence—Whether court properly constituted—Whether criminal proceedings instituted by defendants—Protectorate Ordinance (Cap. 60, *Laws of Sierra Leone,* 1960), *s.* 38.